In the Supreme Court of the United States.

OCTOBER TERM, 1898.

JOE KIRBY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 164.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In this case the indictment was found by the grand jury at October term, 1896, of the United States district court for the district of South Dakota, and was tried at a term of said court held in the month of June, 1897. A verdict was rendered by the jury as follows (Rec., p. 11):

> We, the jury, in the case of the United States against Joseph Kirby, find the defendant guilty as charged in the first count of the indictment.

The first count in the indictment reads as follows (Rec., p. 3):

> At a stated term of the district court of the United States of America for the southern division of the district of South Dakota, begun and held at the city of Sioux Falls, within and for the district and circuit aforesaid, on the third Tuesday of October, in the year of our Lord one thousand eight hundred and ninety-six.
>
> The grand jurors of the United States of America, good and lawful men summoned from the body of the southern division of the district aforesaid to intelligently inquire and true presentment make for said district of South Dakota, in the name and by the authority of the United States of America, upon their oaths do present that Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in said district, heretofore, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at Highmore, in the district aforesaid and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the said United States at Highmore, in said district, and did then and there feloniously steal, take, and carry away from and out of said post-office of the said United States at Highmore aforesaid three thousand seven hundred and fifty postage stamps of the said United States of the denomination of two cents and of the value of two cents each, one thousand two hundred and sixty-six postage stamps of the said United States of the denomination of one cent and of the value of one cent each, one hundred and forty postage stamps of the said United States of the denomination of four cents and of the value

of four cents each, two hundred and fifty postage stamps of the said United States of the denomination of five cents and of the value of five cents each, eighty postage stamps of the said United States of the denomination of eight cents and of the value of eight cents each, and United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver, nick*le*, and copper coins of the said United States and current money of the said United States, a more particular description of which the grand jurors are unable to ascertain, of the value of fifty-eight dollars and nineteen cents, all of which said postage stamps, United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver and nick*le* and copper coins, current money of the United States, so as aforesaid feloniously stolen, taken, and carried away from and out of the said post-office at Highmore aforesaid, was then and there at the time of so being stolen, taken, and carried away the property of the said United States, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that the said Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King were and each of them was duly indicted and convicted of the offense aforesaid at the September term of the said court, held at Deadwood, in said district, in the year of our Lord one thousand eight hundred and ninety-six, and they and each of them were duly sentenced at said September term of said court upon such conviction.

And the grand jurors aforesaid upon their oaths aforesaid do further present that one Joe Kirby,

late of the city of Sioux Falls, in the district aforesaid and within the exclusive jurisdiction of this court, on the ninth day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at the city of Sioux Falls aforesaid, in the district aforesaid, the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

Upon this verdict the court sentenced Kirby to imprisonment at hard labor for two years.

The indictment is drawn under the second section of the following act, which was passed March 3, 1875 (1 Supp. R. S., ch. 144, p. 88):

CHAP. 144. An act to punish certain larcenies and the receivers of stolen goods.

Be it enacted, &c., That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the peni-

tentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

SEC. 2. That if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted;

And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined.

Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, who are alleged, in the first count of the bill of indictment against Kirby, to have broken into the post-office at Highmore and to have stolen the stamps which Kirby is charged with having received and with having in possession, were convicted at a term of the United States dis-

trict court of the district of South Dakota, held at Deadwood in September, 1896. (See Record, beginning on p. 21.)

The indictment against these persons (Rec., p. 22) shows that they were charged with having broken into the United States post-office at Highmore, in the said district, and with stealing therefrom certain moneys, postage stamps, goods, and chattels of the United States.

The stamps which Parley and others were convicted of stealing were the stamps which the indictment against Kirby charged him with receiving, etc.

ARGUMENT.

In the course of the trial the plaintiff in error noted exceptions which were allowed by the court to the number of thirty-three. There appears to be some confusion as to the matter excepted to in some instances, but I think, in substance, the exceptions are as follows, and I state them seriatim for the convenience of the court:

The first exception (Rec., p. 20) is based upon the ground that the count in the indictment (first count) upon which Kirby was arraigned and placed on trial did not state facts sufficient to constitute a crime of which the court had jurisdiction or otherwise, and that the said count did not inform Kirby of the nature and cause of the accusation against him, as required by Article VI of the Amendments to the Constitution of the United States; and that to proceed to trial upon said count would be to deprive Kirby of his liberty or property without due process of law, as provided by Article V of the Amendments to the Constitution of the United States.

The second exception (Rec., p. 20) is based substantially upon the same grounds, and, in addition thereto, in paragraph 4 of the objections (Rec., p. 21) it is insisted that section 2 of the act of Congress approved March 3, 1875, is unconstitutional and not according to due process of law or the laws of the land, and especially in so far as the same attempts to make the judgment of conviction of the principal felon conclusive evidence in the prosecution against the receiver that the property therein described has been embezzled, stolen, or purloined.

The third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth exceptions are all based upon objections severally made to the introduction as evidence of the several parts of the record of the trial of Parley and others. (See record, beginning at third exception on p. 21 to p. 29, inclusive.)

The thirteenth exception is based upon objection to the testimony of B. M. Lister (Rec., p. 30), who was called as a witness to identify Parley and others as the parties named in the bill of indictment. (This witness also stated facts which tended to show that Parley and others named in the indictment robbed the post-office at Highmore.)

The fourteenth exception (Rec., p. 33) is based on an objection to the testimony of Lister, in which the witness, after he had testified that he was not sure as to Baxter, was allowed to state that in his judgment he was the man.

The fifteenth exception (Rec., p. 44) is based upon an objection to the admission of the hotel register at the Clark House, Gettysburg, S. Dak., which shows that

Carroll, Wallace, King, and Baxter registered there on Saturday, June 6, 1896, the objection being overruled, the testimony admitted as Exhibit L, and an exception taken and allowed.

The sixteenth exception (Rec., pp. 59–61) is based upon an objection to the introduction of a freight waybill of the American Express Company, No. 97, June 9, 1896, from Gettysburg, S. Dak., showing that one package was received at Gettysburg on that day, addressed to Mr. Joe Kirby, weighing 2½ pounds, with charges, 35 cents, prepaid; and to introduction of record of waybills forwarded from Gettysburg June 9, 1896, showing package received from E. Baxter, addressed to Mr. Joe Kirby, Sioux Falls, S. Dak., weighing 2½ pounds, prepaid charges 35 cents, which waybills were identified by witness, who was an employee of the company. The objection was overruled and exception noted and allowed.

The seventeenth exception is based upon objection to a certain portion of the testimony of witness Howe as incompetent, irrelevant, and immaterial. (Rec., p. 63).

The eighteenth exception is based upon objection to the introduction of waybill of American Express Company described in record, page 64, which tended to show that, on June 10, 1896, Mr. Joe Kirby received the package weighing 2½ pounds shipped the day before to him from Gettysburg, S. Dak.

The nineteenth exception is based upon an objection to the introduction of the testimony of witness Tyler (Rec., p. 65) as to the entries in the record of the express company, Tyler being an employee, which record tended to show the shipment of the package in question and its

receipt by Kirby. Objection overruled, exception noted and allowed.

The twentieth exception (Rec., p. 65) is based upon an objection to the testimony of witness Tyler relative to the shipment of the package in question; and

The twenty-first exception (Rec., p. 66) is based upon substantially the same grounds; as also

The twenty-second exception (Rec., p. 66).

The twenty-third exception is based upon an objection to the testimony of Nicoli (Rec., pp. 67–68), who was the driver for the American Express Company, and whose business it was to deliver packages which had been shipped by the company. This evidence tended to trace the package in question into the hands of Kirby.

The twenty-fourth exception (Rec., p. 68) is based also upon objection to the testimony of witness Nicoli, and to the testimony of witness Fosness (Rec., p. 69). The testimony of Nicoli, as before stated, was to the effect that he had delivered the express package at the office of Mr. Kirby, in Sioux Falls. This witness stated that his recollection of the delivery of the package at Kirby's office was based upon the fact that the delivery book of the company bore a check mark of the delivery of the package which witness himself had made. The testimony of the next witness (Fosness), which also tended to prove that the package was received by Kirby, related principally to a conversation witness had with Kirby, which resulted in the procurement by the witness from Kirby of the package, which, when opened, contained 1,266 one-cent stamps, 5,050 two-cent stamps, 140 four-cent stamps,

and 150 five-cent stamps, of the total value of $126.76. (See record, pp. 70–73.)

The twenty-fifth exception (Rec., p. 74) is based upon an objection to the testimony of witness Fosness relative to a conversation with Kirby in regard to other packages which were claimed to have been sent to Kirby after the robberies at Miller and Waubay. It will be observed that in the second and third counts of the indictment against Kirby he was charged with having received articles of property belonging to the United States which had been stolen from the post-offices at Miller and Waubay. In his conversation with Fossness he admitted having received certain packages, but that he had not opened them. (See testimony, bottom p. 74 of Rec.)

The twenty-sixth exception (Rec., p. 85) is also based upon exception noted in the examination of Fosness, who was a post-office inspector. This witness, upon cross-examination, was being questioned in regard to instructions to him from the Department. He was asked by counsel for Kirby if he had not received instructions from the Department to demand payment of these losses from Kirby, to which he answered, "No, sir; I didn't." In the further cross-examination he was asked, "Suppose he [Kirby] had paid that, would you have prosecuted him?" and then the question, "Did you have any instructions from the Department in regard to that?" Counsel for the prosecution objected, which was sustained by the court, to which defendant excepted, and exception was allowed. (Rec., p. 85.)

The twenty-seventh exception (Rec., p. 86) is based upon an objection to the testimony of Van Buskirk, witness for the prosecution. Van Buskirk was assistant district attorney, and was called upon to testify as to a conversation in the office of the district attorney on the 2d of July, 1896. The objection was to the testimony of this witness, because he said, in effect, that he recollected the conversation but could not give the exact language, but could give the substance. To this defendant objected. Objection overruled and exception allowed.

The twenty-eighth exception (Rec., p. 86) is based also upon the further testimony of witness Van Buskirk as to the conversation between Mr. Kirby, Mr. Fosness, and Mr. Miller in the district attorney's office. (See testimony beginning under twenty-eighth exception, on p. 86 of the record and extending on p. 87).

On page 89 of the record will be found further exceptions which were allowed. The first, beginning at the top of the page, and not numbered, is based upon a motion by the counsel for Kirby to strike out the testimony of the witness Howe, for reasons stated in the motion; and following is an exception numbered "28," in which counsel moved to strike out all the testimony of the witness Tyler in reference to the receipt at the Sioux Falls office of the express company of a package addressed to Kirby, for reasons stated in the motion; and on the same page an exception numbered "29," in which the counsel moves to strike out all the evidence of the witness Nicoli, for the reasons stated. (There is another exception numbered "28" heretofore.)

The thirtieth exception (Rec., p. 89), the thirty-first and thirty-second (Rec., p. 90), and thirty-third (Rec., p. 91) are based upon the refusal of the court to give special instructions to the jury as requested by counsel for Kirby.

Upon the several exceptions thus stated, taken and allowed during the trial, the counsel for plaintiff in error has made assignments of error to the number of twenty-three (Rec., pp. 100–107), in which the several points suggested by the exceptions are presented, except there appears to be no error assigned as to the application of the Constitution of the United States, and errors assigned in the latter part of assignment 21, and in assignments 22 and 23, are not, so far as I can see, grounded on any exceptions taken and allowed.

The first question for the consideration of the court is as to whether this is a case (it not being a conviction for a capital crime) which can come to the Supreme Court by writ of error directly from the district court, in which the trial was had.

It is insisted by the plaintiff in error that the construction—or, rather, the application—of the Constitution of the United States is involved, and that the constitutionality of a law of the United States is drawn in question.

Although, as stated above, there is no assignment of error based upon the first exception, and so much of the second as relates to the application of a provision of the Constitution of the United States, yet assuming that, notwithstanding this, the court will consider the point, I submit that the position taken by plaintiff in error can not be successfully maintained.

It is contended that the indictment in this case is insufficient, in that it does not charge a criminal offense, and that this involves the application of that part of Article VI of the amendments to the Constitution of the United States which provides that in all criminal prosecutions "the accused shall be informed of the *nature* and *cause* of the accusation." In other words, an indictment which does not contain the allegations, specifications, and technical terms which are necessary to fulfill all of the requirements of the law relative to the sufficiency of indictments is offensive to the provision of the Constitution above quoted.

I present to the court but one view upon this first point, and that is that the indictment is sufficient.

I admit that the offense of which the plaintiff in error is charged is an infamous crime, because the statute creating the offense empowers the court to imprison at hard labor. I also concede that the offense charged is such that the plaintiff in error can not be held to answer except upon the indictment of a grand jury.

With these propositions admitted, as stated before, there is but one question remaining for the consideration of the court, and that is as to whether or not this indictment sufficiently charges the alleged offense.

Let us analyze the count upon which the plaintiff in error was tried, and we find it alleged that Parley, Whalen, and King, on the 7th day of June, 1896, feloniously and forcibly broke into a post-office of the United States at Highmore, in the said district, and did then and there feloniously steal, take, and carry away from and out of said post-office 3,750 postage stamps of the said United

States of the denomination of 2 cents and of the value of 2 cents each, 1,266 postage stamps of the said United States of the denomination of 1 cent and of the value of 1 cent each, 140 postage stamps of the said United States of the denomination of 4 cents and of the value of 4 cents each, 250 postage stamps of the said United States of the denomination of 5 cents and of the value of 5 cents each, 80 postage stamps of the said United States of the denomination of 8 cents and of the value of 8 cents each, * * * all of which said postage stamps * * * so as aforesaid feloniously stolen, taken, and carried away from and out of the said post-office at Highmore aforesaid, were then and there at the time of so being stolen, taken, and carried away *the property of the said United States.*

The indictment then alleges that Parley, Whalen, and King were duly indicted and convicted of the offense aforesaid at September term of the said court, held at Deadwood, in the said district, in the year 1896, etc.; and then it alleges (Rec., p. 4)—

> That one Joe Kirby, late of the city of Sioux Falls, in the district aforesaid and within the exclusive jurisdiction of this court, on the ninth day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at the city of Sioux Falls aforesaid, in the district aforesaid, *the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away* feloniously did receive and have in his possession, with *intent then and there to convert the same to his own use and gain,* the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, etc.

The two objections which are urged to the sufficiency of this indictment are—

First. That it is not charged that the stamps, at the time they were alleged to have been received by Kirby, were the property of the United States; and

Second. That it is not alleged from whom Kirby received them.

It is charged in the first paragraph of the count that certain stamps, the property of the United States, were stolen from a post-office of the United States on the 7th day of June, 1896, by Parley and others; and, following along, it is then charged that on the 9th day of June, 1896, just two days after the theft, Kirby received and had in his possession the postage stamps aforesaid.

Now, what stamps are referred to? What stamps *could* be referred to except the stamps the number, denominations, and values of which are given, and which are specifically alleged to be the property of the United States? There is no other construction to be placed upon the language, and, in fact, the language is plain, direct, and explicit that certain postage stamps, definitely described, the property of the United States, which were stolen from the United States and taken from a post-office of the United States, which is in law the possession of the United States, on the 7th day of June, 1896, were, two days afterwards, to wit, on the 9th day of June, 1896, received by Kirby and had in possession by Kirby, with intent to convert them to his own use and gain, well knowing at the time that the said stamps had theretofore been stolen.

The larceny of these postage stamps by Parley and others did not change the ownership nor deprive the United States of its property in them. The stealing and taking away of the stamps by the thieves only divested the United States of the possession, the right of ownership and the right of property still remaining. Larceny is an offense against the possession. So, then, when it is alleged that these stamps, which are the property of the United States and in the possession of the United States on the 7th day of June, were stolen, and that the plaintiff in error received them on the 9th day of June and had them in his possession on that day, knowing them to have been stolen, unless the larceny of goods takes away the right of property therein these articles were as much the property of the United States on the 9th of June as they were on the 7th.

The charge, therefore, against Kirby is that he did receive and did have in his possession *the postage stamps aforesaid, so as aforesaid feloniously stolen, taken, and carried away.* The "postage stamps aforesaid" were postage stamps, the property of the United States, which were in the possession of the United States in the post-office at Highmore, and which were feloniously taken and carried away from that possession by Parley, Whalen, and King. It seems to me that language could scarcely be found to more explicitly declare that the stamps which were found in Kirby's possession were the property of the United States.

The second objection to the sufficiency of the indictment, as before stated, is that it does not allege from whom Kirby received the property or goods.

If the United States were compelled to rely upon the charge of receiving altogether, there might be room for argument upon this point, and yet the quick succession in which the theft of the postage stamps by Farley, Whalen, and King is committed and the receiving of the stamps by Kirby takes place, precludes the idea that he could have received them from anyone else, and thus, in effect, charges that he received them from the thieves themselves.

It is not, however, settled as a uniform principle of law that in an indictment for receiving stolen goods the name of the person from whom the goods were received must be averred, but the decisions upon this question are very much at variance. In Bishop's New Criminal Procedure, Vol. II, Ch. 53, p. 450, it is laid down that—

> Commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received,

and the author cites in support of this doctrine, 3 Chitty's Crim. Law, 991; Archbd. Crim. Pl. and Ev., 10th London ed., 269, 19th ed., 472; Archbd. New Crim. Proc., 474; *Jupitz* v. *P.*, 34 Ill., 516; *Cohen* v. *P.*, 5 Par. Cr., 330; *S.* v. *Murphy*, 6 Ala., 845; *C.* v. *Lakeman*, 5 Gray, 82; *Reg.* v. *Goldsmith*, Law Reporter, 2 C. C., 74.

And, further, says Mr. Bishop, in the work above cited,

> This question belongs to a class upon which there may not unreasonably be differences of opinion, and perhaps it may properly be influenced by the terms of the statute. (See p. 450.)

But the United States is not in the position that it is compelled to rely upon this line of reasoning.

The indictment alleges that Kirby received the postage stamps, and also charges

> that Kirby feloniously *did have in his possession*, with intent then and there to convert the same to his own use, etc.

So it is not necessary to take the time of the court in discussing the question as to whether it is required in an indictment drawn under this statute to allege from whom the receiver received the goods, or whether this indictment does, in fact, allege that Kirby received the postage stamps which were found in his possession from Parley, Whalen, and King. The indictment fully charges the other crime—that is, the having in possession the property of the United States which had theretofore been stolen, and with the knowledge that the same had been stolen, with intent to convert the same to his own use and gain.

To constitute this latter offense which is declared by the statute, it is not necessary to allege how or from whom the accused received or came into possession of the property. The offense consists in the fact that the accused has or retains in his possession, with intent to convert to his own use or gain, the property of the United States which has theretofore been stolen and which the accused knows has been stolen.

The count upon which Kirby was tried, as before stated, charges that Parley and others stole certain postage stamps, the property of the United States, from the

post-office at Highmore; it charges further that Kirby, knowing that these identical postage stamps, which were definitely described and valued, were stolen, had them in his possession with intent to convert them to his own use or gain.

It is not necessary to cite authorities to enlighten the court as to the sufficiency of indictments; the court is entirely familiar with these principles; but I may say that certainty is required in criminal pleadings in order to notify the defendant, as well as the court, of the nature of the offense charged, and to enable the defendant to plead any judgment which may be rendered in the case as a bar to a subsequent prosecution for the same offense. When these objects are attained, it is generally sufficient, and there need not be *such categorical certainty as entirely to supersede the necessity of extraneous proof.* Such a degree of certainty would even be impracticable, and has never been, in the enforcement of this rule at common law, required in the highest grades of offenses. There must be such certainty as the subject is reasonably capable of, considering the nature of the offense and character of proof necessary to sustain it. (*Horan* v. *State*, 24 Tex., 161.)

A statement of the act constituting the offense, in plain, concise, and intelligible language, is all that is required, so long as the defendant is not misled, and it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it the offense may be sufficiently charged in the language of the statute.

It is reasonable to assume that Congress, apprehending the difficulties which would be encountered in many cases in the effort on the part of the prosecution to prove the person from whom stolen property of the United States found in the hands of another had been received by the latter, created the distinct offense of having or retaining stolen goods in possession in order to avoid such difficulties.

This indictment, at least in so far as is necessary to charge the offense of having these postage stamps in possession, contains all that is necessary to meet these requirements.

Although, as I have said before, the decisions as to the necessity of alleging in an indictment for receiving stolen goods the name of the person from whom they are received are not in harmony, there are leading authorities which sustain the sufficiency of the indictment in this case. One case which is directly in point and to which I call the attention of the court is *Com.* v. *Cohen* (120 Mass., 198). The indictment in that case is similar in form and substantially the same as in the case before us. In fact, it would seem that the draftsman of the indictment against the plaintiff in error had the Massachusetts Case before him at the time. The objections by the defendant's counsel involve the same questions as those presented in this case, but the supreme court of Massachusetts, Chief Justice Gray delivering the opinion, held the indictment sufficient.

I refer the court further upon this subject to *Rex* v. *Jervis*, 6 Car. and P., 156 (330). In this case, which

was an indictment for receiving stolen goods knowing them to have been stolen, Tindal, C. J., says:

> The offense created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen.

See also Thomas's Case, 2 East's P. C., 781.

It is true that the indictment against Kirby contains the word "feloniously," but this does not change the character of the offense charged, and this word can either be disregarded or construed to include "unlawfully." (*State* v. *Murphy*, 21 Ind., 441; *Beavers* v. *State*, 58 Ind., 530.)

The indictment concludes "contrary to the form of the statute." This is sufficient to indicate that the act is unlawful, without averring it to have been unlawfully done; so the word "feloniously" may be omitted and the indictment would still be sufficient. (*State* v. *Tibbetts*, 86 Me., 189.)

The second assignment of error, and which plaintiff in error claims also involves a constitutional question, is that he had once been put in jeopardy for the same offense. The facts, as I gather them from the record, on which this point is based, are that previously to the trial and conviction of the plaintiff in error, and during the same term of the court, a trial upon this indictment had been begun and proceeded with, and the case given to the jury; that the jury remained out for some twenty-four hours and were unable to agree; whereupon the court, the jury having made it known to the court that they were unable to agree, found the fact that the jury could

not agree, entered a mistrial, and discharged the jury. The plaintiff in error, by a motion filed in the case (Rec., pp. 16, 17), says that this proceeding was taken in his absence, and that therefore it amounts to an acquittal, or that he has been once in jeopardy for the same offense and can not again be put upon trial.

The record does not show that the plaintiff in error was absent when the proceeding was taken. On the other hand, the only reference to it that I find is on page 17 of the printed record, in the order of the court denying the motion which immediately precedes. I copy the order of the court in full, and it is as follows:

> Motion denied for the reason that the records of this court show that the defendant was once tried on this indictment at the present term, and the jury, after being out twenty-four hours, returned into court and said they were unable to agree upon a verdict, and the court, being of the opinion that said jury could not agree, discharged them from the further consideration of the case, *the defendant being at large on bail.* Defendant excepted to this ruling, and exception allowed.

That the plaintiff in error was not present when this proceeding was taken is a mere inference, and an inference which, I say, is not well founded. The order of the court says: "The defendant being at large on bail." The defendant is at large when he is on bail, and still he might have been present in the court room during the whole proceeding.

So I submit that the record does not show that he was not present. No record of any previous trial in the case is before this court.

But, for the sake of the argument, suppose the court can find enough in the record to conclude that the proceeding, in which the mistrial was entered because of the disagreement of the jury and the jury discharged by the court, was had when the plaintiff in error was not actually present.

I contend that this indictment does not charge a crime of the grade which requires the accused to be present at all stages of the proceeding. The indictment against the plaintiff in error does not charge a felony. The rule, as I understand it, is that unless the offense denounced by the statute is made a felony by the statute, or unless it was a felony at common law and is punished under its common-law name, then it is not a felony, although it may be infamous under that clause of the Constitution which requires it to be tried upon an indictment. (*Bannon and Mulkey* v. *United States*, 156 U. S., 464.)

The offense of receiving stolen goods has not been made a felony by any legislation of Congress; nor has the offense of having in possession stolen goods with intent to convert to one's use or gain been made a felony by any legislation of Congress. The law which authorizes prosecutions for receiving property of the United States which has been stolen, etc., or for having or retaining in possession property of the United States which has been stolen, with intent to convert to one's use or gain, is the second section of the act before copied in this brief. It will be observed that section one of the act denounces the embezzling, stealing, or purloining of the property of the United States as a felony; but section two, under

which this indictment is drawn, simply describes the elements of the offense and prescribes the manner of punishment, and thus the plaintiff in error is charged with an offense which only reaches the grade of a misdemeanor.

Offenses are either felonies or misdemeanors under the laws of the United States, and as offenses against the United States are such as are declared by statute, only such are felonies as are made so by statute. (*Barber* v. *State*, 50 Md., 161; *State* v. *Wheeler*, 3 Vt., 344.)

The offense of receiving stolen goods was not a felony at common law (see Bishop's New Crim. Law, vol. 2, § 1137), and, as before stated, the enactment of a common-law offense into a statutory offense does not change the grade of the offense unless so declared by the statute.

If the position is correct that the indictment against the plaintiff in error charged a misdemeanor, then it was not a constitutional requirement to be present at all stages of the proceeding, and especially is there no constitutional right infringed when the absence of the accused is voluntary and not enforced. The record shows that the plaintiff in error was at large on bail and there was therefore nothing to prevent his being present if he so desired.

In *Hopt* v. *Utah* (110 U. S.), Mr. Justice Harlan, in delivering the opinion of the court, says, on page 578:

> But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a *felony*, *must* be "personally present at the trial."

and the same doctrine is reiterated by Mr. Justice Shiras in *Lewis* v. *United States* (146 U. S., 370), that, whilst the rule may be relaxed in misdemeanors, yet in *felonies* the accused must be present during the trial.

The principle declared, therefore, is that in felonies the accused *must* be present at all stages of the trial, yet, in misdemeanors, whilst it is his right to be present, if he is voluntarily absent during the progress of the trial, it does not affect the validity of the proceeding. (See *State* v. *Wheeler*, 3d Vt., 344.)

But if it sufficiently appears that there was a former trial of the plaintiff in error for this offense, and such proceedings were had therein as to entitle him to the benefit of the plea of former conviction, or former acquittal, he has not placed himself in the situation to render such plea available in the case before this court.

The only plea which plaintiff in error entered to the indictment upon which he was tried was the plea of "not guilty." (Rec., p. 7.) This part of the record shows that the plaintiff in error, with his attorney, F. R. Aikens, filed a demurrer to the indictment. The demurrer was overruled by the court and, says the record, "thereupon defendant enters his plea of not guilty to said indictment."

It is true that the plaintiff in error, by his attorneys (Rec., p. 16), moved the court that the action be abated and dismissed on the ground, as stated in substance in the motion filed, that there had been a previous trial of the case, beginning on the 19th of April, 1897, and that on the 22d of April, 1897, and after the case had gone to the jury, the said jury were by the court, in the

absence of the plaintiff in error, and without his knowledge or consent, etc., discharged from the further consideration of the case, and thereby the plaintiff in error was in effect found not guilty; and for this reason, that to place him upon trial again upon this indictment would be to put him a second time in jeopardy, etc.

On this motion, presented as it was, the court very properly denied and refused to dismiss the action. There was no evidence before the court that there had been any former trial except the mere statement of the fact in the written motion filed by the attorneys of the plaintiff in error.

A plea of former acquittal or conviction to be valuable for defense must be pleaded. *State* v. *Morgan*, 95 N. C., 641; *State* v. *Barnes*, 32 Me., 530.)

Much particularity is also required in the form of this plea, and it must be so presented that, upon the face of it, the facts constitute in law a bar. It must show a record of a former conviction or acquittal in a court of competent jurisdiction and must show the identity of the offense. The matter of the record can not be established otherwise than by itself. (*Robbins* v. *Budd*, 2 Ohio, 263; *Rex* v. *Vandercomb*, 2 Leach, 708–711; see also Bishop's New Crim. Proc., Vol. I, Ch. 52, pp. 474–477.)

It is not incumbent upon the prosecution to traverse a plea of former acquittal or conviction, and the burden is on the accused pleading former acquittal or conviction to show that he has been acquitted or convicted of the identical offense for which he is being tried. (*Rickles* v. *State*, 68 Ala., 538; *Vowells* v. *Com.*, 83 Ky., 193.)

The issue joined upon a special plea of a former trial is an issue of fact to be tried by the jury. (*Grant* v. *People*, 4 Park., Cr. Rep. (N. Y.), 527.)

It may be urged that the filing of this written motion, in which it is stated that the plaintiff in error had before been tried and proceedings were had which amounted to an acquittal, put the prosecution upon notice of this defense and that the court ought to have considered it in the light of a plea. This could only be, however, upon the hypothesis that it is the duty of a court before which a criminal trial is progressing, to advise an accused or his attorneys as to the proper method of conducting the defense. There is no such obligation resting on the court.

And then, the written paper which was filed by the attorneys for plaintiff in error as a motion that the action abate or be dismissed is not sufficiently formal, nor does it contain facts sufficient to constitute a proper plea of former acquittal. A plea of former acquittal, to be sufficient, must contain the record and facts which will identify the offense, so that if the jury find the facts to be as stated in the plea, the court can determine as a matter of law that there has been a former acquittal.

And then, upon the plea of former acquittal the accused raises an issue of fact in which the burden of proof is upon him. (Bishop's New Criminal Procedure, vol. 1, sec. 816, p. 478, paragraph 2.)

The record of the former trial must be produced, and it is conclusive for what is provable thereby.

The matter of the record can not be established otherwise than by the record itself, and there must be no

variance between the record and the plea. (Bishop's New Criminal Procedure, vol. 1, sec. 816, paragraph 3, page 478.)

These authorities are all to the end that the formal plea can not be dispensed with; that the same must be filed; must set forth matter sufficient, if true, to constitute in law a bar to the second trial, and that the accused must show a record, such as he describes in his plea, and introduce testimony to identify the offense.

The plaintiff in error has complied with none of these requirements.

Another point which plaintiff in error says involves a constitutional right which was denied him is the challenge to the array of jurors. (Rec., p. 15.)

I do not deem it necessary to take the time of the court in discussing this proposition. I merely call attention to the order (Rec., p. 14), which is as follows:

> *To the clerk of the United States circuit court for said district, and H. J. Davenport, jury commissioner of said district:*
>
> For the purpose of securing a fair and impartial trial of the causes set for trial on the 25th day of May, A. D. 1897, in the above-entitled court, and in pursuance of section 802, R. S. U. S., you are hereby ordered and directed to draw and summon sixty persons from the body of the southern division of the district of South Dakota, excluding the territory within the incorporated limits of the city of Sioux Falls, within the county of Minnehaha and district of South Dakota, and in accordance with the act of Congress defining the manner of drawing jurors approved June 30th, 1879, as amended and modified

by the act of Congress approved November 3d, 1893, to serve as petit jurors at the ensuing adjourned April term, A. D. 1897, of said district court, to be and appear before said district court, to be holden in the rooms used for holding the sessions of the United States courts, in the city of Sioux Falls, in said district, on Tuesday, the 25th day of May, A. D. 1897, at ten o'clock a. m. of said date, and bid them not to depart without leave of court first obtained, and for this purpose it is ordered that a venire issue forthwith after the said drawing shall have taken place and a report thereof duly filed.

By the court:

JOHN E. CARLAND, *Judge.*

Section 802 Revised Statutes reads:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services.

The jury was drawn from the State and district in which the alleged offense was committed, and the district from which it was drawn had been previously ascertained by law. (*Pointer* v. *United States*, 151 U. S., 396, 407.)

The remaining assignment by plaintiff in error, involving a constitutional question, is that the constitutionality of the act of March 3, 1875, is drawn in question, it being the position of plaintiff in error, as stated in his brief—

First, that the charge was based on an unconstitutional statute;

Second, that the essential ingredients of the offense were not attempted to be proven by the witnesses, whom,

it was claimed, had knowledge of those facts, but by record of the trial of the principal felon;

Third, that the statute of March 3, 1875, in so far as it enacts that the judgment against the principal felon shall be conclusive evidence in the prosecution against the receiver that the property had been stolen, is unconstitutional.

The objectionable portion of the statute, as I understand it, is the last paragraph of section 2, which paragraph is as follows:

> And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined.

The plaintiff in error undertakes to raise the question of the constitutionality of the above portion of the act by objections to the introduction as evidence of the several parts of the record of the trial of Parley, Whalen, and King, which were offered by the United States attorney. These objections will be found noted at pages 22 to 28 of the record, inclusive.

The grounds of objection are set out in full on page 23 of the record, at the bottom of the page, and were stated when the United States attorney offered to introduce the indictment against Parley, Whalen, and King, the said objection being as follows:

> That it is incompetent, irrelevant, and immaterial and that it does not conform to the allegations contained in the indictment in the case at bar; and,

> further, for the reason that the act of Congress approved March 3rd, 1875, under which it is sought to introduce this exhibit, as heretofore expressly stated by the defendant, is unconstitutional;

and the same objection was restated as the several parts of the record in the trial of the principal felons were offered in evidence.

It is the latter clause of the objection which is to be considered by the court here, and, unless the point is so presented by the plaintiff in error as to directly draw in question the constitutionality of the act, then the writ of error from the district court to the Supreme Court of the United States does not lie. The fact that testimony admitted by the court is incompetent, irrelevant, or immaterial, or that it does not conform to the allegations contained in the indictment, would be a matter for review by the circuit court of appeals, because a criminal case less than a conviction for a capital felony could not come directly by writ of error from the district court to the Supreme Court upon such question.

The position which I shall urge (and I may say with confidence) is that the proceedings had in the trial, the conditions under which this record was offered, together with the action of the court with reference to this testimony, are such that the constitutionality of the act above referred to is not brought in question.

It will be observed (Rec., p. 21) that O. S. Pendar, clerk of the United States court at Deadwood, S. Dak., was called to the stand by the United States attorney, and by him the record of the trial of Parley, Whalen, and King was identified as the record of the court of

which he was clerk. Then the record of Kirby's trial states—

> Thereupon the prosecution offered in evidence page 23 of the journal of this court, referred to and produced by witness Pendar, as follows:

and throughout the whole course of the introduction by the prosecution of this record, nothing is stated by the United States attorney except that the same is offered in evidence.

When the prosecution had closed its case and rested, the plaintiff in error offered no testimony, but contented himself with a motion to the court (Rec., p. 89) to strike out certain evidence which had been introduced by the prosecution, and he did not include in this motion, as will be seen, a request that the evidence contained in the record of the trial of Parley, Whalen, and King should be stricken out, but, so far as is shown by the record itself, the testimony to which he objected at the close of the trial, and which he desired should be stricken out before the case went to the jury, was a portion of that of the witness Howe, and also of the witness L. S. Tyler and the witness Nicoli, in regard to particular facts set forth in the motion on page 89.

That this record and judgment were not admitted by the court as conclusive of the fact that the property found in possession of the plaintiff in error was stolen, or as conclusive of any other fact, is shown by the charge of the court to the jury (Rec., p. 93), and which upon this point is as follows:

> Now, upon the first proposition—as to whether the property described in the indictment was stolen

as alleged in the indictment—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties whom it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, that record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property described in the indictment was actually stolen, as alleged, from the post-office at Highmore. *But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore post-office.*

The judge states unequivocally to the jury that *they must not understand that the record which was introduced proves that the stamps which were found in Kirby's possession were stolen property or that they were the stamps taken from the Highmore post-office.* He also charged the jury that this record only made a *prima facie* case on the part of the Government that the stamps charged in the indictment against Parley, Whalen, and King were stolen property, and that, nothing appearing to the contrary, the jury would be authorized to conclude that the stamps described in the said indictment—that is, the indictment against Parley, Whalen, and King—were stamps which had been stolen from the post-office at Highmore.

So that, under the circumstances, the introduction of this record, at most, is nothing more than a piece of evidence offered by the prosecution, like any other evidence in the case, to go to the jury for their consideration, with other testimony and circumstances tending to show the guilt of the accused.

If the record was incompetent as evidence, and was improperly admitted by the court because of its incompetency upon the exception thereto by the plaintiff in error, he could have the ruling of the court in this respect reviewed by the circuit court of appeals; but the admission of the testimony under such circumstances does not raise the question of the constitutionality of the act of Congress so as to entitle the case to come directly to the Supreme Court. In order that the plaintiff in error could be in position to entitle him to bring his case by writ of error directly from the district court to the Supreme Court in this case, the question of the effect of this record as evidence in the case should have been held by the court below to be conclusive of the fact that the stamps in Kirby's possession were stolen.

The record does not show that it was the purpose of the prosecution in offering this record to prove thereby the fact that the property found in the possession of the plaintiff in error had been stolen, and if this was not the object for which the record was introduced the question of the validity of the act can not arise; and not only that, but, in order to raise the question as to the constitutionality of the act, the record must be offered as evidence of the fact that the property charged in the indictment against the receiver has been stolen and the

court must admit it and hold it as a matter of law to be conclusive of that fact. In other words, the introduction of the judgment, as it is called in the act of Congress, must be accepted by the court as conclusively establishing the fact that the property found in the possession of the receiver has been stolen, without the right or opportunity to the accused to controvert this fact.

I insist that no such condition is presented by the record here.

When the record was offered, the plaintiff in error objected to it on the ground that it was incompetent, irrelevant, and immaterial, and that it did not conform to the allegations contained in the indictment. If this is the view in which he regarded this testimony, and the court overruled his objection, the case could not come to the Supreme Court, but should have gone to the circuit court of appeals.

It is true that the plaintiff in error further suggested that the act of Congress under which it is sought (as he says) to introduce this record is unconstitutional; but the assertion that the prosecuting attorney sought to introduce the record by virtue of any provision of the act of March 3, 1875, is not founded upon any statement of the prosecuting attorney as to how or why he offered the record, nor upon any action of the court as to the grounds upon which or the purposes for which it was admitted.

In order to draw the constitutionality of this statute in question, this record must not only have been introduced as evidence of the fact that the property charged

in the indictment against plaintiff in error had theretofore been stolen from the United States, but as *conclusive evidence* of that fact—that is, when the record was in—the court should have held that the fact that the postage stamps which were found in Kirby's possession were stolen property was proven, and proven conclusively, and that the accused had no right to contradict that fact.

The plaintiff in error could easily have presented the question in its proper form had he elected to do so, and instead of resting his case when the prosecution had closed he could have offered some testimony—one witness would have been sufficient—to prove that the postage stamps which were found in his possession were not stolen property. Then, if the prosecuting attorney had taken the position that this record was conclusive of that fact, and the court had so held, the question would have been raised and presented in proper form to this court.

I do not wish to be understood as taking the position that the courts can uphold an act of Congress which undertakes to make the record or the judgment in the trial of a person convicted of larceny conclusive evidence of the fact that the goods were stolen, in the trial of another indicted for receiving the stolen goods. But there are some authorities which appear to make the record of the conviction of the principal felon competent testimony in the trial of the receiver. In the case of *Rex* v. *Blick* (4 Car. & P., 377), which is a case in which the defendant was indicted for receiving stolen goods, the principal felon having theretofore confessed his guilt upon an indictment charging him with the offense, it was held by Mr. Justice Bosanquet that the

conviction of the principal on his own confession was *prima facie* evidence of his guilt as against the accessory, but not conclusive.

There is another important consideration relating to the admissibility of this record in another view than that it was offered to prove that the postage stamps found in possession of the plaintiff in error were stolen, and that is that it is alleged in the indictment that Parley, Whalen, and King, who broke into the post-office at Highmore on the 7th day of June, 1896, and stole certain property, and among other things certain postage stamps belonging to the United States, had been tried for the offense and convicted.

Now, if this allegation was material, and there has been no suggestion that it was not, then it was competent for the prosecution to introduce evidence to prove it.

Then what was the best evidence to prove that Parley, Whalen, and King had been convicted? Undoubtedly the record of the case in which they were tried.

However, I reassert the position that, in order to avail himself of the point that the act making the judgment of conviction of the principal felon conclusive evidence in this case of the fact that the goods received by or found in the possession of the accused had been stolen, is unconstitutional, the plaintiff in error must have had a decision of the court below upon the point holding that the record introduced by the prosecution was conclusive evidence of that fact.

The plaintiff in error does not come before this court in this situation. On the other hand, he comes here with the only ruling of the court which was made upon the

question directly to the contrary, a ruling in which the court held as a matter of law that the record did not prove that the stamps that were found in Kirby's possession were stolen property or that they were the stamps taken from the Highmore post-office.

I shall not extend this brief to discuss the other exceptions which were taken on the trial and allowed by the court, and which are stated hereinbefore. It is true that if the court here acquires jurisdiction of this case upon any of the constitutional questions involved, it has the power to dispose not only of such constitutional questions, but of the entire case as it may be presented on exceptions allowed during the trial. (*Chappelle* v. *United States*, 160 U. S., 499.) The exceptions, other than those based upon constitutional grounds, as will be seen, are to the admission of testimony under objection by the plaintiff in error and to the refusal of the court to give certain special instructions to the jury requested by the plaintiff in error.

I think the court will see, upon an examination of the several exceptions to the introduction of testimony noted in the record and referred to heretofore by me, that they are not well taken. No error was committed by the presiding judge in his refusal to give the special instructions requested. The charge in respect to these instructions (the court, I think, will see) covers the law.

The plaintiff in error, in his brief, has asserted (brief, p. 21, VII) that—

> If the record of the conviction of the principal felons be laid out of the case, there is then no evidence that the property was "stolen property;"

and further—

> and there is no evidence whatever that it was the property of the United States.

These are very broad assertions when considered in the light of the fact that there is testimony on the part of the prosecution tending to show that the post-office of the United States at Highmore was robbed on the 7th day of June, 1896, by Parley, Whalen, and King; that there was taken therefrom certain property of the United States, among other a large quantity of postage stamps of the United States of various denominations, the whole aggregating about $170 in value, the principal part of which consisted of the value of the stamps; that a man calling himself E. Baxter, which was the alias of Whalen, one of the robbers, shipped by express from Gettysburg, S. Dak., on the 9th day of June, 1896, two days after the robbery of the Highmore post-office, a package weighing 2½ pounds, with the express charges of 35 cents prepaid, to Mr. Joe Kirby at Sioux Falls (see Rec., pp. 60, 61; also, Rec., p. 64); that this package was received by Joe Kirby at Sioux Falls on or about the day of shipment and about two days after the robbery; that the package remained in the possession of Kirby until the 2d day of July, 1896, when it was delivered by him to C. M. Fosness, a post-office inspector, and was found to contain postage stamps of the United States of the value of $126. (See testimony of Fosness, and receipt given for package, Rec., p. 85.)

Aside from the other testimony which tended to prove that these were the stamps which were stolen from the

post-office at Highmore on the 7th of June, and shipped to Kirby by Whalen under his alias of E. Baxter, from Gettysburg, on the 9th, Kirby himself substantially admitted in his conversation with Fosness and Van Buskirk (see Rec., p. 86) that they were the stamps which had been stolen from the said post-office.

It also appears in the testimony that there had been robberies of the post-offices of the United States at Miller and Waubay, in South Dakota, and it will be seen by an examination of the testimony of Fosness (Rec., p. 74) that Kirby had received packages containing stamps stolen from these two offices. (See testimony at bottom of page 74, Record, as to conversation between Fosness and Kirby, in which Kirby admitted having the packages, but declined to open them or disclose their contents.)

Aside from this, the possession of this package of stamps, which were of the character, denomination, and about the aggregate value of those stolen at Highmore, was of itself strong evidence against the plaintiff in error. It may be that the finding in his possession of this character of property was not sufficiently recent after the theft to raise the presumption that he was guilty of larceny; but it is a strong circumstance to be considered by the jury tending to show his guilt of having received stolen property or having in his possession stolen property with a guilty knowledge.

I think I am justified in calling the attention of the court thus far to some of the facts in the case which the testimony of the United States tended to prove, since the plaintiff in error insists that there was no evidence ex-

cept the record of the trial of Parley and others that the stamps found in the possession of plaintiff in error were stolen, or that they were the property of the United States.

JAS. E. BOYD,
Assistant Attorney-General.